U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF G-USA, INC.

DATE: SEPT. 30, 2016

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a biotechnology firm, seeks to permanently employ the Beneficiary as a research and development scientist. It requests classification of the Beneficiary as a member of the professions holding an advanced degree. *See* Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A). This classification allows a U.S. employer to sponsor a professional with an advanced degree or its equivalent for lawful permanent resident status.

On November 4, 2015, the Director, Nebraska Service Center, denied the petition.[1] The Director concluded that the record did not establish the Petitioner's continuing ability to pay the proffered wage from the petition's priority date onward.

The matter is now before us on appeal. The Petitioner asserts that its consistent receipt of government grants over the past 10 years demonstrates its ability to pay the proffered wage. Upon *de novo* review, we will dismiss the appeal.

I. LAW AND ANALYSIS

A. The Petitioner's Ability to Pay the Proffered Wage

A petitioner must demonstrate its continuing ability to pay a proffered wage from a petition's priority date until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must include copies of annual reports, federal income tax returns, or audited financial statements. *Id.*

In the instant case, an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the U.S. Department of Labor (DOL), accompanies the petition. The petition's priority date is November 4, 2014, the date the DOL accepted the labor certification application for processing. *See* 8 C.F.R. § 204.5(d).

[1] U.S. Citizenship and Immigration Services' (USCIS') copy of the decision in the file is dated October 30, 2015. But the Petitioner's copy of the decision indicates its issuance on November 4, 2015.

The accompanying labor certification states the proffered wage of the offered position of research and development scientist as $80,454 per year.

The record before us closed on July 8, 2016, with our receipt of the Petitioner's response to our notice of intent to dismiss (NOID). At that time, the Petitioner submitted evidence that its federal income tax return for 2015 was unavailable. We will therefore consider the Petitioner's ability to pay the proffered wage only in 2014, the year of the petition's priority date.

In determining a petitioner's ability to pay a proffered wage, we first examine whether it paid a beneficiary the full proffered wage each year from the petition's priority date. If a petitioner did not pay the full proffered wage each year, we next examine whether it generated sufficient annual amounts of net income or net current assets to pay the difference between any wages paid and the proffered wage. If a petitioner's net income or net current assets are insufficient, we may also consider the overall magnitude of its business activities. *See Matter of Sonegawa,* 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).[2]

In the instant case, the Petitioner submitted evidence of its payments to the Beneficiary in 2014. A copy of an IRS Form W-2, Wage and Tax Statement, indicates the Beneficiary's receipt that year of $52,764.96. The amount on the Form W-2 does not equal or exceed the annual proffered wage of $80,454. The record therefore does not demonstrate the Petitioner's ability to pay the proffered wage based on its payments to the Beneficiary.

But we credit the Petitioner's payments to the Beneficiary. The Petitioner must demonstrate its ability to pay the difference between the annual proffered wage and the amount paid to the Beneficiary, or $27,689.04, in 2014.

The Petitioner's federal income tax return for 2014 reflects a net loss and net current liabilities. The record therefore does not demonstrate the Petitioner's ability to pay the proffered wage based on its net income or net current assets.

As previously indicated, we may consider the Petitioner's ability to pay the proffered wage beyond its net income and net current assets. *See Sonegawa*, 12 I&N Dec. at 614-15. We may consider such factors as: the number of years the Petitioner has conducted business; the growth of its business; its number of employees; the occurrence of any uncharacteristic business losses or expenses; its reputation in its industry; whether the Beneficiary will replace a current employee or outsourced service; or other evidence of its ability to pay.

[2] Federal courts have upheld our method of determining a petitioner's ability to pay a proffered wage. *See, e.g., River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Estrada-Hernandez v. Holder*, 108 F. Supp. 3d 936, 942-43 (S.D. Cal. 2015); *Rivzi v. Dep't of Homeland Sec.*, 37 F. Supp. 3d 870, 883-84 (S.D. Tex. 2014), *aff'd*, 627 Fed. App'x. 292 (5th Cir. 2015).

The Petitioner's 2014 tax return indicates that it was incorporated on January 12, 2004. The Form I-140, Immigrant Petition for Alien Worker, and the accompanying labor certification state the Petitioner's employment of 10 people. But copies of the Petitioner's quarterly federal tax returns indicate that, from the third quarter of 2014 to the second quarter of 2016, it employed no more than eight people. Therefore, although the Petitioner has been in business for numerous years, it employs a small number of employees.

The Petitioner appears to have a good reputation in its industry. However, unlike the petitioner in *Sonegawa*, the record does not indicate growth of the Petitioner's business since its incorporation or the occurrence of uncharacteristic losses or expenses. The record also does not indicate that the Beneficiary will replace a current employee or outsourced service, as the Beneficiary is currently employed by the Petitioner in the proffered job.

Thus, applying the *Sonegawa* factors to the instant case, the record does not establish the Petitioner's ability to pay the proffered wage.

The Petitioner asserts that its funding record demonstrates its ability to pay the proffered wage. In a November 20, 2015, letter, the Petitioner's chief scientific officer (CSO) states that a clinical diagnostic company like the Petitioner usually spends 8 to 10 years and more than $30 million to develop a product. Until a product launches, the letter states that such a company typically employs advanced degree holders with average annual salaries of more than $80,000.

But the record does not support the Petitioner's payment of average salaries of more than $80,000 in 2014. The Petitioner's 2014 quarterly tax returns indicate that, in the third quarter, it paid 6 employees $88,071.79, and that, in the fourth quarter, it paid 7 employees $86,977.62. Over the entire year, the tax records indicate an average employee annual salary of significantly less than $80,000.[3]

The Petitioner's CSO states that the company plans to launch a product within a year and, at that time, expects to raise more than $5 million. The CSO also states that the Petitioner expects sales of more than $50 million in 5 years.[4] Although the Petitioner's expects a bright future, the record does not demonstrate its ability to pay the proffered wage from the petition's 2014 priority date. *See Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg'l Comm'r 1977) (holding that a petitioner "cannot expect to establish a priority date for visa issuance for the beneficiary when at the time of making the job offer . . . [it] could not, in all reality, pay the salary as stated in the job offer").

[3] The Petitioner's federal income tax return reflects that it paid total compensation of $357,872 in 2014. Assuming that the Petitioner employed about seven employees during the entire year, the average annual salary of its employees would be $51,125.

[4] A visa petition may not be approved based on speculation of future eligibility or after the petitioner becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg'l Comm'r 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971).

The Petitioner asserts that USCIS' Adjudicator's Field Manual (AFM) supports the company's claimed ability to pay the proffered wage. As the Petitioner notes, the manual states:

> Sometimes companies will operate at a loss for a period of time to improve their business position in the long run. A prime example of that would be research and development costs on a product line that is not expected to generate revenue for several years. In those instances the documentation should fully explain the sources of funding for the entity (or unit) and the expected profit potential.

USCIS AFM, Chapt. 22.2(c), *available at* https://www.uscis.gov/sites/default/files/ocomm/ilink/0-0-0-6423.html (accessed Sept. 28, 2016)

The Petitioner cannot judicially rely on guidance in the AFM. *See, e.g., Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5th Cir. 2000) (citation omitted) (holding that an agency's internal personnel guidelines "neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely").

In any event, the Petitioner omits the sentence that immediately follows its quotation. The following sentence in the AFM states: "Whether the company can demonstrate it has the ability to pay the alien the wages described in the petition will depend on the specific facts presented."

In the instant case, the record establishes the Petitioner's funding sources, including its receipt of a $1,652,954 grant paid from September 1, 2013, to September 30, 2015.[5] The portion of the grant funds paid to the Petitioner in 2014 are represented on its 2014 tax return and included in the calculation of the Petitioner's net loss that year. Thus, notwithstanding the grant, the record does not establish the Petitioner's ability to pay the full proffered wage in 2014. The Petitioner paid the Beneficiary $52,764.96 in 2014. But, given its expenses, it has not established that it could have paid the $27,689.04 difference between the proffered wage and the amount paid to the Beneficiary.

The record does not establish the Petitioner's ability to pay the proffered wage from the petition's priority date. We will therefore affirm the Director's decision and dismiss the appeal.

B. The Validity of the Labor Certification and the *Bona Fides* of the Job Opportunity

Although unaddressed in the Director's decision, the record also does not establish the validity of the accompanying labor certification or the *bona fides* of the job opportunity.

[5] The Petitioner submits its bank statements for various months between November 1, 2012, and May 30, 2014, to demonstrate the income it received during those intermittent periods. However, no evidence was submitted to demonstrate that the funds reported on the Petitioner's 2014 bank statements somehow reflect additional available funds that were not reflected on its 2014 tax return, such as the Petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that was considered in determining the Petitioner's net current liabilities.

A petition for an advanced degree professional must be accompanied by a valid individual labor certification, an application for Schedule A designation, or documentation of a beneficiary's qualifications for a shortage occupation. 8 C.F.R. § 204.5(k)(4)(i). We may invalidate a labor certification after its issuance upon a finding of fraud or willful misrepresentation of a material fact involving the labor certification. 20 C.F.R. § 656.30(d).

A willful misrepresentation of a material fact must be voluntary and deliberate, made with knowledge of its falsity. *Forbes v. INS*, 48 F.3d 439, 442 (9th Cir. 1995). A misrepresentation is material if it has "a natural tendency to influence the decisions" of the government. *Id.* at 442-43 (citing *Kungys v. United States*, 485 U.S. 759, 772 (1988)).

In response to Question C.9 on the accompanying ETA Form 9089, the instant Petitioner indicated that it was not "a closely held corporation, partnership, or sole proprietorship in which the alien has an ownership interest." In response to our NOID, however, the Petitioner submitted evidence of the Beneficiary's ownership interest in the corporation. A copy of a stock certificate indicates the Beneficiary's possession of 34,000 shares in the Petitioner. The stock certificate is not dated.

The stock certificate appears to contradict the Petitioner's statement on the accompanying labor certification that the Beneficiary is not an owner of the privately held company. "[F]ailure to disclose familial relationships or ownership interests when responding to Question C.9 is a material misrepresentation and may therefore be grounds for denial, revocation or invalidation [of a labor certification]." DOL, Office of Foreign Labor Certification, "OFLC Frequently Asked Questions and Answers," at https://www.foreignlaborcert.doleta.gov/faqsanswers.cfm (accessed Sept. 28, 2016).

The Petitioner also certified on the accompanying labor certification that "[t]he job opportunity has been and is clearly open to any U.S. worker." *See* 20 C.F.R. § 656.10(c)(8). If the job opportunity was not clearly open to U.S. workers, then the Petitioner may have also misrepresented the *bona fides* of the job opportunity.

As the Board of Alien Labor Certification Appeals (BALCA) has explained, the regulation at 20 C.F.R. § 656.10(c)(8) "infuses the recruitment process with the requirement of a *bona fide* job opportunity: not merely a test of the job market." *Matter of Modular Container Sys., Inc.*, 89-INA-228, 1991 WL 223955, *7 (BALCA 1991) (*en banc*) (referring to the former, identical regulation at 20 C.F.R. § 656.20(c)(8)).

> Where the alien for whom labor certification is sought is in a position to control hiring decisions or where the alien has such a dominant role in, or close personal relationship with, the sponsoring employer's business that it would be unlikely that the alien would be replaced by a qualified U.S. applicant, the question arises whether the employer has a *bona fide* job opportunity.

Id.

To determine the *bona fides* of a job opportunity, we must consider multiple factors, including but not limited to, whether a foreign national: is in a position to control or influence hiring decisions regarding an offered position; is related to corporate directors, officers, or employees; incorporated or founded a company; has an ownership interest in it; is involved in its management; sits on its board of directors; is one of a small group of employees; and has qualifications matching specialized or unusual job duties or requirements stated on an accompanying labor certification. *Id.* at *8. We must also consider whether a foreign national's pervasive presence and personal attributes would likely cause a petitioner to cease operations in the foreign national's absence and whether the employer complied with DOL regulations and otherwise acted in good faith. *Id.* Multiple *Modular Container* factors suggest that the offered position was not clearly available to U.S. workers. The record on appeal indicates the Beneficiary's possession of an ownership interest in the Petitioner. The record also indicates that the Beneficiary is one of a small group of employees.

A petitioner bears the burden of establishing eligibility for a requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. The instant Petitioner must therefore explain the apparent misrepresentations on the accompanying labor certification regarding the Beneficiary's ownership interest in the corporation and the *bona fides* of the job opportunity. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) (requiring a petition to resolve inconsistencies of record by independent, objective evidence pointing to where the truth lies).

In any future filings in this matter, the Petitioner must document that it did not willfully misrepresent the Beneficiary's ownership interest in the corporation and that the offered position was clearly available to U.S. workers.

For the foregoing reasons, the record does not establish the validity of the accompanying labor certification or the *bona fides* of the job opportunity. For these reasons, we will also dismiss the appeal.

II. CONCLUSION

The record does not establish the Petitioner's ability to pay the proffered wage from the petition's priority date. The record also does not establish the validity of the accompanying labor certification or the *bona fides* of the job opportunity. For these reasons, we will dismiss the appeal.

The petition will remain denied for the above-stated reasons, with each considered an independent and alternate ground of denial. In visa petition proceedings, a petitioner bears the burden of establishing eligibility for a requested benefit. Section 291 of the Act; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, the instant Petitioner did not meet that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of G-USA, Inc.*, ID# 123450 (AAO Sept. 30, 2016)